

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of KATTIE IRWIN, DAWSON
IRWIN, and SHAYNE LYNN RENEE
SCHOOLCRAFT, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

RONALD IRWIN,

Respondent-Appellant,

and

SHARICA SCHOOLCRAFT

Respondent.

UNPUBLISHED

July 13, 2001

No. 229012

Cheboygan Circuit Court

Family Division

LC No. 98-000531-NA

Before: Hood, P.J., and Whitbeck and Meter, JJ.

WHITBECK, J. (*concurring*).

I concur in the result the majority opinion reaches. Even though Ronald Irwin was not a respondent in the proceedings at the time the family court conducted the adjudication in this case, the family court acknowledged its obligation to ensure that the Family Independence Agency (FIA) presented legally admissible evidence to support termination.¹ The FIA did provide this legally admissible evidence, which established clear and convincing proof of grounds to terminate Irwin's parental rights under MCL 712A.19b(3).² Because termination was not clearly contrary to the children's best interests, the family court properly terminated his parental rights.³ Like the majority, I see no merit to the other issues Irwin raises. I write separately to explain,

¹ MCR 5.974(E)(1).

² See *id.*

³ MCR 5.974(E)(2).

briefly, one aspect of this case that I find somewhat troubling, though not sufficiently so to warrant reversing the family court's order.

I. The One Parent Problem

From my perspective, the FIA⁴ *should* list both parents as respondents in a protective proceeding if all the following conditions exist: (1) the FIA knows both parents' identities, (2) the FIA knows both parents' whereabouts, (3) there are grounds to list both parents as a respondent in a protective proceeding, and (4) the FIA intends to initiate protective proceedings against at least one parent. If the FIA does not make both parents respondents under these circumstances, which I refer to as the one parent problem, a number of difficult issues may affect the course of the proceedings and the nonparty parent's substantive legal rights.

First, when the one parent problem exists, the FIA usurps the right of the parent who is not listed as a respondent to demand a jury for the adjudication.⁵ I think it possible that if the FIA worker and legal staff handling a case are particularly pressed for time because of a heavy caseload, they might see a jury trial for the adjudication as a waste of time. In such an instance, the FIA worker and legal staff could make a calculated guess concerning which parent was less likely to demand a jury trial, proceed only against that parent, and then later add allegations to the petition concerning the other parent who had, for instance, voiced an intent to demand a jury, simply in order to preclude one parent from demanding a jury trial.⁶ While this tactic may not violate any specific statute or court rule governing child protective proceedings, it nevertheless lacks the fundamental fairness that is the hallmark of the American justice system. Though I have every reason to believe that most, if not all, FIA workers who initiate child protective proceedings are efficient, compassionate, and fair advocates for children, I would hate to see child protective proceedings become yet another avenue for legal gamesmanship.

Second, when the one parent problem exists, it affects the nonparty parent's ability to challenge the family court's jurisdiction over the children. Michigan law is well-settled in holding that the time to challenge a family court's order assuming jurisdiction over minor children in a protective proceeding is immediately after the family court takes jurisdiction, not after it terminates parental rights.⁷ However, I think it possible, if not probable, that if the nonparty parent challenged the family court's jurisdiction properly, this Court would dismiss the appeal for lack of standing. After all, from the state of the pleadings in such a case, the appealing parent's parental rights are not at risk and, therefore, it is questionable whether that nonparty parent is aggrieved within the meaning of the court rules.⁸

⁴ I focus on the FIA because it is a child protective agency and is involved in the vast majority of cases in which a family court considers a petition to terminate parental rights.

⁵ See MCR 5.911.

⁶ See MCR 5.974(A)(3).

⁷ See *In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993).

⁸ See *Dept' of Consumer & Industry Services v Shah*, 236 Mich App 381, 385; 600 NW2d 406 (1999) (discussing MCR 7.203(A) and related case law).

Yet, the nonparty parent cannot wait until the FIA makes him or her a respondent by proceeding under MCR 5.974(E) in order to gain standing. The factfinding step in MCR 5.974(E)(1) may be considered roughly equivalent to an adjudication, strictly in the sense that it requires legally admissible evidence. Yet the court rules under this changed circumstance provision in MCR 5.974(E)(1) do not create a natural opportunity to file a direct appeal by providing for two phases of proceedings in the way an adjudication is separate from a disposition; once the factfinding step is complete and there is evidence supporting termination, the family court immediately moves to the best interests consideration.⁹ Of course, having already terminated the parental rights of the parent originally excluded from the proceedings, an appeal to this Court challenging the family court's subject-matter jurisdiction will likely fail because it is a collateral attack. This leaves no practical opportunity for the parent originally excluded from the petition to challenge the family court's subject-matter jurisdiction.

II. Irwin's Circumstances

The record in this case indicates that, from the very early stages of the proceedings, the FIA was aware of several important facts or issues. The FIA knew that Irwin was the presumed father¹⁰ of three of the children at issue in this case. The FIA was aware that he was imprisoned and where he was imprisoned. I infer from the FIA's expertise in child protective proceedings and familiarity with the statutory grounds for termination, the FIA knew soon after it located Irwin that there were significant obstacles to his ability to provide proper care and custody for his children because he was incarcerated and would remain incarcerated for some time. Because of Irwin's background and criminal history, as well as his extended absence from the children's lives, I find it highly probable that at some time in the early stages of this case the FIA determined that it would petition to terminate his parental rights. Irwin was even present at hearings and represented by counsel before he was made a party. Nevertheless, the FIA did not make Irwin a respondent in the proceedings before the adjudication. While I acknowledge that the FIA had no duty stemming from statute or court rule to do so, I question why the FIA would wait to make him a respondent. I do not, however, find error requiring reversal in this delay because Irwin does not challenge it.

III. Conclusion

Some might contend that it is not necessary to emphasize the rights of both parents when the parent who is made a respondent from the start is able to demand the procedures, whether a jury trial for the adjudication or an interlocutory appeal of the family court's order taking

⁹ It is not clear to me whether, to avoid the collateral attack rule, this Court would conclude that the parent had an obligation to ask the family court to stay the proceedings following the factfinding stage in MCR 5.974(E)(1) to file a direct appeal. See *Hatcher, supra* at 444 ("Our ruling today severs a party's ability to challenge a probate court decision years later in a collateral attack *where a direct appeal was available.*") (emphasis added).

¹⁰ See *Serafin v Serafin*, 401 Mich 629, 636; 258 NW2d 461 (1977) (children born during marriage are "guarded by the still viable and strong, though rebuttable, presumption of legitimacy").

jurisdiction. However, all too frequently parents are adversaries, not allies. They may be divorced, never married, or simply not concerned about each other. Further, they often have different attorneys with different legal strategies calculated to protect their individual interests regardless of the other parent's interests. In some instances the parent originally made a respondent in the proceeding dies or abandons his or her parental rights. Thus, it is impractical to believe that a nonparty father can rely on the respondent mother to demand the procedure that would benefit the father, or vice versa.

Others might argue that this concern for *parental* rights in a *child* protective proceeding is unwarranted. I wholly agree the primary focus of a child protective proceeding is the health, safety, and well-being of children. Nevertheless, when a court terminates parental rights, it not only has a significant effect on the children's lives, it is also a drastic step that forever affects the parents' liberty interest in raising their children, an interest that the Constitution protects in no uncertain terms.¹¹ While the juvenile code¹² and the court rules¹³ may technically allow termination of parental rights without certain procedures, the right to due process may nevertheless impose additional safeguards to ensure the fundamental fairness of the proceedings.

It is important to remember that even children benefit from proceedings that are fair to parents. Fairness inspires confidence in difficult decisions, like the decision to terminate parental rights. After all, while the cases appealed in which termination of parental rights is legally questionable are few and far between, courts do no good by depriving parents of the opportunity to demonstrate their fitness. Fairness also promotes finality. If a family court terminates parental rights following fair proceedings, it is far less likely that a child's life will once again be thrown into chaos by reversal on appeal for a due process violation or other error.

Though I am satisfied with the fairness of the proceedings in this case, I remain convinced that courts must not be so distracted by well-intentioned and perfectly justified efforts to protect children that they ignore how they treat parents.

/s/ William C. Whitbeck

¹¹ See, generally, *Stanley v Illinois*, 405 US 645, 651; 92 S Ct 1208; 31 L Ed 2d 551 (1972).

¹² MCL 712A.1 *et seq.*

¹³ MCR 5.901 *et seq.*